

Message Text

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E. O. 11652: N/A

TAGS: EFIN, KE

SUBJ: US-KENYA TREATY DISCUSSIONS

DEPT PASS DEPT OF TREASURY

1. SUMMARY: U.S. PROPOSALS REJECTED BY KENYA. LITTLE AP-
PARENT LATITUDE FOR COMPROMISE. TENTATIVELY AGREED, SUBJECT
TO REVIEW, TO LEAVE MANAGEMENT FEES OUT OF TREATY EXCEPT
WHERE INCOME CONNECTED WITH P.E. U.S. PROPOSED NO TAX ON
EXPENSE REIMBURSEMENT IN RELATED COMPANY CASES. END SUMMARY.

2. INITIAL U.S. PROPOSAL THAT KENYA MAY TAX PORTION OF GROSS
FEE ALLOCABLE TO SERVICES PERFORMED IN KENYA AT FIVE PERCENT, WITH
TAXPAYER GIVEN NET ELECTION. KENYA FLATLY REJECTED ALL THREE
ASPECTS OF PROPOSAL. SECOND U.S. PROPOSAL -- DROPPING ALLOCATION
ON BASIS OF WHERE SERVICES PERFORMED ALSO REJECTED, AS WAS THIRD
PROPOSAL TO ALSO DROP NET ELECTION EXCEPT IN RELATED PERSONS CASES.

3. KENYA PROPOSED LEAVING MANAGEMENT FEES OUT OF TREATY. UNDER
PROPOSAL, FEES WOULD BE EXCLUDED FROM INDUSTRIAL AND COMMERCIAL
PROFITS, EXCEPT WHERE CONNECTED WITH P.E., AS WELL AS FROM INDE-
PENDENT PERSONAL SERVICES ARTICLE. EACH COUNTRY WOULD USE ITS OWN
SOURCE RULES, THUS LEAVING SUBSTANTIAL ELEMENT OF DOUBLE TAX.

KENYA TAXES 20 PERCENT OF GROSS FEE. U.S. DEL AGREED TO RECOM-
MEND APPROVAL OF THIS APPROACH IN WASHINGTON. U.S. FURTHER PRO-

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POSED THAT KENYA NOT TAX WHERE FEE IS REIMBURSEMENT FOR COST.

THOUGH THIS NOT MADE PART OF PACKAGE, U.S. DEL NOTED THAT AGREEMENT TO THIS WOULD IMPROVE CHANCES OF USG APPROVAL. KENYA NOT FAVORABLY DISPOSED, BUT AGREED TO CONSIDER.

4. KENYA CONCERNED ABOUT PRECEDENT. ALL CONCLUDED KENYA TREATIES (MAINLY SCANDINAVIAN) ALLOW BROAD IMPOSITION OF 20 PERCENT KENYA TAX. INITIALED U.S. DRAFT WITH KENYA PERMITS 15 PERCENT WITHHOLDING ON MANAGEMENT FEES PAID BY GOVERNMENT OR BY RELATED PARTIES. NEW ZEALAND TAX ADVISOR TO GOK INFORMED US THAT A LARGE NUMBER OF TREATIES ARE UNDER NEGOTIATION BY KENYA WITH SEVERAL CONTENTIONS ISSUES IN THEM.

5. IN UNRELATED ISSUE, U.S. AGREED TO PUT EXCEPTION IN NONDISCRIMINATION ARTICLE FOR RECENTLY ENACTED 7.5 PERCENT BRANCH PROFITS TAX. BRANCH OF FOREIGN CORPORATION TAXED AT 52.5 PERCENT WHILE DOMESTIC CORPORATION TAXED AT 45 PERCENT. U.S. RAISED POSSIBILITY OF NEED TO ADD "SECOND DIVIDEND TAX" SOURCE RULE.
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